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In the Supreme Court of the United States

OCTOBER TERM, 1993

PAUL CASPARI, SUPERINTENDENT, MISSOURI EASTERN
CORRECTIONAL CENTER, ET AL., PETITIONERS

v.

CHRISTOPHER BOHLEN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

Whether the Double Jeopardy Clause of the Fifth Amendment prohibits a State from introducing new evidence in support of a particular noncapital sentence at a second sentencing proceeding, after the evidence at the first hearing was held insufficient to sustain that sentence.

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INTEREST OF THE UNITED STATES

This case involves the application of the Double Jeopardy Clause to noncapital sentencing proceedings. Because the United States as a prosecuting authority is a party to many such proceedings, and because resentencings are frequently required under the federal Sentencing Guidelines, the United States has a significant interest in the Court's disposition of the double jeopardy issue in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall * * * be sub-

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ject for the same offence to be twice put in jeopardy of life or limb."

2. The relevant portions of Mo. Rev. Stat. §§ 557.036, 558.011, 558.016, and 558.021 (Supp. 1982) are reproduced in the Appendix, *infra*, 1a-5a.

STATEMENT

1. On April 17, 1981, respondent and a number of other individuals entered a jewelry store in St. Louis County, Missouri, held employees and customers at gunpoint, and then robbed the store and its employees of money and jewelry. As a result of that incident, a jury in the Circuit Court of St. Louis County convicted respondent on three counts of first-degree robbery, in violation of Mo. Rev. Stat. § 569.020 (1978). See Pet. App. A4, A27-A28, A57, A63-A64.

Because Missouri law defines first degree robbery as a Class A felony, the authorized term of imprisonment for that crime is "a term of years not less than ten years and not to exceed thirty years, or life imprisonment." Mo. Rev. Stat. § 558.011.1(1) (Supp. 1982).¹ Missouri law generally provides that the jury sets the maximum penalty to be imposed on the defendant. If the court finds the defendant to be a persistent offender, however, the court sets the sentence without regard to the jury's recommendation.

¹ We cite the versions of the relevant Missouri statutes in effect on October 15, 1982, when respondent was sentenced (see Pet. App. A28). Respondent would have been subject to the same term of imprisonment under the sentencing schedule in effect at the time of the offense, which was enacted at 1979 Mo. Laws 633 and codified at Mo. Rev. Stat. § 558.011 (Supp. 1980).

Mo. Rev. Stat. § 557.036.4 (Supp. 1982).² A persistent offender is any person "who has pleaded guilty to or has been found guilty of two or more felonies committed at different times." Mo. Rev. Stat. § 558.016.3 (Supp. 1982).³ The persistent-offender sentencing procedure requires the State to establish the defendant's persistent-offender status beyond a

² Section 557.036 establishes the jury's role in sentencing rather circuitously. First, Section 557.036.2 requires the court to instruct the jury to "assess and declare the punishment as a part of their verdict." Section 557.036.3 then requires the court to select a sentence under Section 557.036.1, which requires a determination of punishment "having regard to the nature and circumstances of the offense and the history and character of the defendant." Section 557.036.3 also provides, however, that the term selected by the court under Section 557.036.1 cannot be longer than the term selected by the jury unless the jury selected a term shorter than the shortest term provided for the offense by statute (in which case the judge cannot impose a term of imprisonment longer than the shortest permissible term). The jury's involvement in the process is bypassed when the defendant is a persistent offender, because in that event "[t]he court shall not seek an advisory verdict from the jury," and if the jury renders such a verdict, "the court shall not deem it advisory, but shall consider it as mere surplusage." Mo. Rev. Stat. § 557.036.5 (Supp. 1982).

³ With respect to Class A felonies, a persistent-offender determination does not alter the sentencing range, but simply shifts sentencing authority to the judge. Mo. Rev. Stat. § 557.036.4(2) (Supp. 1982) ("If [the defendant] has been found guilty of a class A felony, the court may impose any sentence authorized for a class A felony."); *id.* § 558.016.6 (1) (Supp. 1982) ("The total authorized maximum ter[m] of imprisonment for a persistent offender * * * [is]: (1) For a class A felony, any sentence authorized for a class A felony."). The court of appeals' contrary statement (Pet. App. A13-A14) is incorrect.

reasonable doubt. Mo. Rev. Stat. § 558.021.1(2) (Supp. 1982). In this case, the trial court sentenced respondent as a persistent offender and imposed three consecutive terms of 15 years' imprisonment. J.A. A11-A17; see Pet. App. A4, A27-A28, A38, A73-A74.

2. On direct appeal, the Missouri Court of Appeals affirmed respondent's convictions but remanded for resentencing. Pet. App. A63-A74. The court explained that "although [respondent] was sentenced by the judge as a persistent offender no proof was made of the prior convictions." *Id.* at A73. Accordingly, the court remanded the case to the trial court to allow it to reconsider respondent's persistent-offender status. *Id.* at A74.

3. On remand, the State introduced evidence that respondent had four prior felony convictions. Respondent argued that the Double Jeopardy Clause barred the State from introducing evidence that had not been introduced at the original trial and sentencing hearing. The trial court rejected that argument, determined that respondent was a persistent offender, and imposed the same sentence it had imposed at the first sentencing hearing—three consecutive terms of 15 years' imprisonment. J.A. A18-A35; see Pet. App. A5, A39-A40.

4. Respondent appealed again, and the Missouri Court of Appeals affirmed in all respects. Pet. App. A57-A62. With respect to respondent's resentencing, the court simply noted that "[t]he question of double jeopardy was not involved because those provisions of the Fifth Amendment have been held not to apply to sentencing." *Id.* at A58 (citing *State v. Lee*, 660 S.W.2d 394, 399 (Mo. Ct. App. 1983)).

5. Respondent then sought postconviction relief in the state trial court. That court denied relief, and the Missouri Court of Appeals affirmed, explaining that it had rejected respondent's Double Jeopardy claim on the appeal from respondent's resentencing. *Bohlen v. State*, 743 S.W.2d 425, 429 (Mo. Ct. App. 1987); see Pet. 13.

6. In 1989, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. The petition was referred to a magistrate, who wrote a lengthy report recommending that the petition be denied. Pet. App. A27-A56. In particular, the magistrate recommended rejection of respondent's argument that this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981), barred the State from introducing evidence of respondent's prior convictions at the second sentencing hearing. Pet. App. A37-A49. That conclusion rested on the magistrate's view that "the initial sentencing hearing did not have the hallmarks of an adversary trial on guilt or innocence." *Id.* at A47. The magistrate explained that the parties did not make opening and closing statements and that the proceeding was, "for all practical purposes, a non-adversarial proceeding * * * [in which the] sentencing judge could select from a wide range of possible sentences to implement at his discretion." *Id.* at A48. The district court adopted the magistrate's report by order. *Id.* at A25-A26.

7. The court of appeals reversed. Pet. App. A3-A24. The court viewed the question before it as whether this Court's decision in *Bullington* applies to sentencing proceedings in noncapital cases. The court first noted that under *Teague v. Lane*, 489 U.S. 288

(1989) (plurality opinion of O'Connor, J.), it could grant relief for respondent if applying *Bullington* to noncapital cases would not be a new rule. Pet. App. A6-A8. The court then examined this Court's decisions in *Burks v. United States*, 437 U.S. 1 (1978), and *Bullington* (both of which were decided before petitioner's conviction became final in 1985), and concluded that those decisions dictated granting the relief sought by respondent. Pet. App. A9-A16. The court explained that Missouri's persistent-offender sentencing enhancement procedure "has protections similar to those in the capital sentencing hearing in *Bullington*," and rejected the State's argument that *Bullington* "does not extend to non-capital cases." *Id.* at A12-A14. The court also rejected the State's argument that the decision of the Missouri Court of Appeals was reasonable in light of similar decisions by federal courts of appeals. *Id.* at A17-A23. Accordingly, the court held that respondent's resentencing violated the Double Jeopardy Clause, and it directed that he be resentenced without application of the persistent-offender statute. *Id.* at A23.

SUMMARY OF ARGUMENT

This Court has recognized a fundamental distinction between the portion of a criminal proceeding that determines guilt or innocence and the portion that determines the appropriate punishment. Many of the protections that the Constitution requires in a criminal trial, such as the right to a jury, the right to confront adverse witnesses, and the requirement that the prosecution prove its case beyond a reasonable doubt, do not apply in the sentencing context. The double jeopardy prohibition against reprocsecution

after an acquittal has also been held generally inapplicable to sentencing. For double jeopardy purposes, the Court has held that the selection of a sentence ordinarily does not have the finality of a verdict of acquittal. Hence, this Court has recognized as a general rule that courts may conduct new sentencing proceedings and may alter previously entered sentences without violating the Double Jeopardy Clause.

The decision in *Bullington v. Missouri*, 451 U.S. 430 (1981), articulated a narrow exception to that general rule, based on the unique nature of the modern capital sentencing hearing. As the Court explained in *Bullington*, Missouri (like other States with the death penalty) has invested its capital sentencing procedures with many of the hallmarks of a trial on guilt or innocence, so that the capital sentencing hearing closely resembles the main trial. The *Bullington* Court reasoned that the close resemblance of the capital sentencing hearing to an actual trial justified extending the Double Jeopardy Clause to ensure the finality of the result of the capital sentencing hearing.

The rule of *Bullington* should not be extended to a case such as this one. The hearing at issue here bears little resemblance to a trial on the question of guilt or innocence. The only significant difference between a traditional sentencing proceeding and the proceeding at issue in this case is that in order to establish a defendant's persistent-offender status, the State must prove the defendant's prior convictions beyond a reasonable doubt. Given the sentencing court's freedom to consider a wide variety of factors in selecting a sentence and the court's discretion to choose a sentence from within a broad statutory

range, the hearing closely resembles the traditional sentencing proceeding and has little in common with the elaborate capital sentencing proceeding that was before the Court in *Bullington*. For that reason, this case calls for application of the traditional rule that the prohibition against reprocsecution after an acquittal does not apply to sentencing proceedings; it does not call for application of the narrow exception to that rule that the Court devised in *Bullington*.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR THE STATE FROM SEEKING A PARTICULAR SENTENCE AT A SECOND NONCAPITAL SENTENCING HEARING AFTER THE EVIDENCE AT THE FIRST HEARING WAS HELD INSUFFICIENT TO SUSTAIN THE SENTENCE IMPOSED

The guarantee of the Double Jeopardy Clause consists of “three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted). This case involves the first of those protections, against reprocsecution after acquittal. The question presented is whether that protection attaches at a noncapital sentencing proceeding. We submit that it does not.

A. The Double Jeopardy Clause’s Prohibition Of Reprosecution After An Acquittal Generally Does Not Apply At Sentencing Proceedings

Our criminal justice system recognizes a fundamental distinction between the tasks of determining

guilt and imposing sentence. Among other things, the government must prove its case regarding factual guilt beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 361-364 (1970); the government’s proof at trial is subject to the Confrontation Clause of the Sixth Amendment as well as other nonconstitutional rules that limit the evidence that the government can present; and for serious offenses the defendant is entitled to a trial by jury. The sentencing process is much more flexible. The government need satisfy only the preponderance-of-the-evidence standard, see *McMillan v. Pennsylvania*, 477 U.S. 79, 91-93 (1986). The sentence may be (and, except in capital cases, typically is) imposed by the court rather than a jury, see *Spaziano v. Florida*, 468 U.S. 447, 457-465 (1984). And the Confrontation Clause does not limit the evidence that the sentencer may consider—rather, the sentence may be based on “the fullest information possible concerning the defendant’s life and characteristics,” *Williams v. New York*, 337 U.S. 241, 247 (1949), and may be the product of “an inquiry broad in scope, largely unlimited either as to the kind of information [the judge] may consider, or the source from which it may come,” *United States v. Tucker*, 404 U.S. 443, 446-447 (1972).⁴

The fundamental distinction between determining guilt and imposing sentence is reflected in this Court’s

⁴ The sentencing procedure must be sufficiently reliable to satisfy due process, see *Townsend v. Burke*, 334 U.S. 736, 741 (1948), but “[t]he fact that due process applies [at sentencing] does not, of course, implicate the entire panoply of criminal trial procedural rights.” *Gardner v. Florida*, 430 U.S. 349, 358 n.9 (1977) (plurality opinion of Stevens, J.).

decisions interpreting the Double Jeopardy Clause. As the Court noted in *United States v. DiFrancesco*, 449 U.S. 117 (1980), an approach under which the pronouncement of a particular sentence was to be treated as “an ‘implied acquittal’ of any greater sentence” would result in an extension to sentencing of the finality the Constitution mandates for acquittals. *Id.* at 133. The *DiFrancesco* Court rejected that approach as being inconsistent with historical practice and the Court’s own decisions. First, the Court explained, “fundamental distinctions between a sentence and an acquittal * * * [h]istorically [have deprived] the pronouncement of sentence * * * [of] the finality that attaches to an acquittal.” *Ibid.* For example, the English common-law system allowed a judge to increase a sentence imposed on a defendant at any time during the term of court in which the judge imposed the original sentence. *Id.* at 133-134. Similarly, the Court explained, it is an “established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence * * * so long as he has not yet begun to serve that sentence.” *Id.* at 134. Neither of those practices would be consistent with the notion that pronouncement of sentence implicitly acquits the defendant of any greater sentence.

In accord with that historical tradition, the Court repeatedly has permitted trial courts in a variety of contexts to impose a higher sentence than the one imposed at the time of the original sentencing proceeding. See, e.g., *North Carolina v. Pearce*, 395 U.S. at 719-721 (“[T]he guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction,” and “the power to retry * * * is the power, upon the defendant’s reconviction, to impose whatever sentence may

be legally authorized, whether or not it is greater than the sentence imposed after the first conviction.”); *Bozza v. United States*, 330 U.S. 160, 166-167 (1947) (trial court corrected error in sentence later on the day of sentencing); *Stroud v. United States*, 251 U.S. 15, 16-18 (1919) (trial court imposed death penalty upon retrial after first conviction was reversed on appeal, even though Stroud had not received death penalty after first conviction; Court explained that imposition of a harsher sentence had not “placed [Stroud] in second jeopardy within the meaning of the Constitution”); see also *Chaffin v. Stynchcombe*, 412 U.S. 17, 23-25 (1973) (discussing *Stroud* and *Pearce*). In sum, the Court has generally declined to apply the Double Jeopardy Clause’s prohibition of reprocution after an acquittal outside the context of a criminal trial on the issue of guilt or innocence.

B. The Prohibition Of Reprosecution After An Acquittal Applies To Sentencing Only When The Earlier Sentencing Proceeding Was Functionally Equivalent To A Trial On The Issue Of Guilt Or Innocence

The decision of the court of appeals to invoke the Double Jeopardy Clause in this case rested on this Court’s holding in *Bullington v. Missouri*, 451 U.S. 430 (1981). In *Bullington*, the jury had declined to impose the death penalty at the time of the original trial and conviction. A new trial was then granted on grounds unrelated to the sentence. The prosecution announced its intention to seek the death penalty in the second proceeding. This Court, however, held that the Double Jeopardy Clause barred the State from seeking the death penalty after the jury at the first trial had declined to impose that penalty.

The Court in *Bullington* did not purport to overrule the general principle that the Double Jeopardy Clause's prohibition against reprocsecution after acquittal is not applicable to sentencing proceedings. Rather, the Court's opinion focused on the unique features of modern capital sentencing proceedings, which give those proceedings "the hallmarks of the trial on guilt or innocence." *Bullington*, 451 U.S. at 439. As the Court explained, the jury at Bullington's capital sentencing proceeding, unlike the sentencer in a conventional sentencing proceeding, did not have "discretion to select an appropriate punishment from a wide range authorized by statute," but instead had to make "a choice between two alternatives." *Id.* at 438. Moreover, the procedure at issue in *Bullington* required the prosecution to undertake "the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts." *Ibid.*⁵

⁵ Of the 37 States that permit capital punishment, 26 require by statute that at least one aggravating circumstance be found beyond a reasonable doubt. See Ark. Code Ann. § 5-4-603(a)(1) (Michie Supp. 1991); Colo. Rev. Stat. Ann. § 16-11-103(1)(d) (West Supp. 1992); Del. Code Ann. tit. 11, §§ 4209(d)(1)(a), 4209(e) (Supp. 1992); Idaho Code § 19-2515(g) (1987); 720 Ill. Compiled Stat. 5/9-1(f) (Supp. 1993); Ind. Code Ann. § 35-50-2-9(a) (Burns Supp. 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1990); La. Code Crim. Proc. Ann. art. 905.3 (West Supp. 1993); Md. Ann. Code art. 27, § 413(d) (Supp. 1992); Miss. Code Ann. § 99-19-103 (Supp. 1992); Mo. Rev. Stat. § 565.030.4(1) (Supp. 1993); N.H. Rev. Stat. Ann. § 630:5.III (Supp. 1992); N.J. Stat. Ann. § 2C:11-3.c(2)(a) (West Supp. 1993); N.M. Stat. Ann. § 31-20A-9 (Michie 1990); N.C. Gen. Stat. § 15A-2000 (e)(1) (1992); Ohio Rev. Code Ann. § 2929.04(B) (Anderson 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West Supp.

Under the Missouri capital sentencing statute, as the Court noted, counsel could make opening statements, testimony was taken, evidence was introduced,

1993); Or. Rev. Stat. § 163.150(1)(d) (1990); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. § 16-3-20(C) (Law Co-op. Supp. 1992); S.D. Codified Laws Ann. §§ 23A-27A-5, 23A-27A-6 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Code Crim. Proc. Ann. art. 37.071.2(c) (West Supp. 1993); Va. Code Ann. § 19.2-264.4.C (Michie 1990); Wash. Rev. Code Ann. § 10.95.060(4) (West 1990); Wyo. Stat. § 6-2-102(e) (Supp. 1992); see also Ga. Code Ann. § 17-10-30(c) (1990) (imposing that requirement in all cases except those involving aircraft hijacking and treason). The federal continuing criminal enterprise death penalty statute, 21 U.S.C. 848(j), contains a similar requirement. The federal air piracy statute, however, requires that aggravating circumstances be proved only by a preponderance of the evidence. 49 U.S.C. App. 1473(c)(5).

In six States in which the statute is silent as to the burden of proof, the courts have interpreted the statute to require proof of at least one aggravating factor beyond a reasonable doubt. See *Whisenhant v. State*, 482 So. 2d 1225, 1235 (Ala. Crim. App. 1982) (interpreting predecessor to Ala. Code § 13A-5-47(e)), aff'd in relevant part, *Ex parte Whisenhant*, 482 So. 2d 1241, 1245 (Ala. 1983); *State v. Brewer*, 826 P.2d 783, 800 (Ariz.) (interpreting Ariz. Rev. Stat. Ann. § 13-703.C), cert. denied, 113 S. Ct. 206 (1992); *State v. Daniels*, 542 A.2d 306, 312-313 (Conn. 1988) (interpreting Conn. Gen. Stat. § 53a-46a(c)); *Johnson v. State*, 438 So. 2d 774, 779 (Fla. 1983) (interpreting Fla. Stat. Ann. § 921.141(3)), cert. denied, 465 U.S. 1051 (1984); *State v. Joubert*, 399 N.W.2d 237, 247 (Neb. 1986) (interpreting Neb. Rev. Stat. § 29-2522), cert. denied, 484 U.S. 905 (1987); *Gallego v. State*, 711 P.2d 856, 862 (Nev. 1985) (interpreting Nev. Rev. Stat. Ann. § 200.030.4(a)), cert. denied, 479 U.S. 871 (1986); see also *State v. Lafferty*, 749 P.2d 1239, 1260 (Utah 1988) (holding that Utah Code Ann. § 76-3-207(2) requires the State to prove beyond a reasonable doubt that defendant committed the crime which was being treated as an aggravating factor), aff'd on reconsideration, 776 P.2d 631 (Utah

the jury was instructed, and final arguments were made. The jury then deliberated and returned its formal punishment verdict. *Bullington*, 451 U.S. at 438-439 n.10. The sentencing hearing therefore "resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes." 451 U.S. at 438.

By contrast, the Court explained, sentencing proceedings ordinarily do not resemble trials on the issue of guilt or innocence. The sentencer typically has broad discretion to select a sentence from within a range of sentences, not "only two choices, death or life imprisonment." *Bullington*, 451 U.S. at 440. And even where sentencing proceedings call on the prosecution to establish particular facts in order to justify a particular sentence, the standard of proof is typically the preponderance-of-the-evidence standard rather than the beyond-a-reasonable-doubt standard imposed in the Missouri capital sentencing proceeding. 451 U.S. at 441.

Because those features of the sentencing proceeding at Bullington's initial trial made "the sentencing pro-

1989). But see *People v. Marshall*, 790 P.2d 676, 690-691 (Cal. 1990) (upholding death sentence imposed without beyond-a-reasonable-doubt instruction), cert. denied, 498 U.S. 1110 (1991).

Finally, several States also require proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. See Ark. Code Ann. § 5-4-603(a)(2) and (3) (Michie Supp. 1991) (requiring proof beyond a reasonable doubt that aggravating factors outweigh mitigating factors); N.J. Stat. Ann. § 2C:11-3.c(3)(a) (West Supp. 1993) (same); Tenn. Code Ann. § 39-13-204(f) (1991) (same); *State v. Wood*, 648 P.2d 71, 83 (Utah 1982) (interpreting Utah statute to reach same result).

ceeding at [his] first trial * * * like the trial on the question of guilt or innocence," the Court reasoned that Bullington was entitled to "the protection afforded by the Double Jeopardy Clause to one acquitted by a jury." *Bullington*, 451 U.S. at 446. That reasoning reflects the Court's conclusion that when the capital sentencing proceeding is so much like the portion of the proceeding that determines guilt or innocence, the protections of the Double Jeopardy Clause available to the defendant at the guilt-determining portion of the trial should extend to the sentencing phase as well. See *Spaziano v. Florida*, 468 U.S. at 458-459 ("This Court * * * has recognized that a capital proceeding in many respects resembles a trial on the issue of guilt or innocence" in ways "significant to the Double Jeopardy Clause").⁶

That analysis closely parallels the Court's reasoning in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), where the Court noted that the State's allocation of responsibility between the factfinder and sentencer does not invariably define the reach of the federal constitutional protections applicable in criminal trials. The Court made clear in *Mullaney* that although a State enjoys substantial latitude in defining crimes and devising sentencing procedures, it could not avoid the constitutional protections applicable to criminal trials simply by defining some traditional element of a crime as a sentencing factor and leaving the deter-

⁶ The Court distinguished *Stroud v. United States*, *supra*, on that ground, noting that although the Court in *Stroud* had held that the Double Jeopardy Clause does not prohibit the enhancement of sentence at a second sentencing proceeding, the sentencing proceeding in that case "did not have the hallmarks of the trial on guilt or innocence." *Bullington*, 451 U.S. at 439; see also *id.* at 446.

mination of that element to the sentencer under the more relaxed procedures applicable to sentencing. See *Mullaney*, 421 U.S. at 698-699 (reach of beyond-a-reasonable-doubt rule turns on "substance rather than * * * formalism * * * [and] requires an analysis that looks to the operation and effect of the law as applied and enforced by the State" (internal quotation marks omitted)); see *Patterson v. New York*, 432 U.S. 197, 210-211 (1977) (*Mullaney*'s approach imposes "constitutional limits beyond which the States may not go" in the process of redefining elements of crimes as affirmative defenses).

The Court employed a similar approach in *Specht v. Patterson*, 386 U.S. 605 (1967). There, the Court invalidated a Colorado sentencing scheme that in effect subjected the defendant to a separate criminal proceeding carrying significant new penalties under the guise of enhancing his sentence for an underlying offense. Because the sentencing proceeding afforded the defendant none of the protections of a criminal trial, even though it effectively exposed him to criminal punishment on a new charge, the Court concluded that the Colorado scheme failed to satisfy the requirements of due process.

As the Court did in *Mullaney* and *Specht*, it declared in *Bullington* that the line between the trial on the merits and the sentencing proceeding was not entirely dictated by the State's allocation of some responsibilities to the trier of fact and others to the sentencer. Instead, it required a functional analysis. Because the Court determined that the gravity and character of the sentencing proceeding in *Bullington* made it the functional equivalent of the trial on guilt or innocence, it found that the Double Jeopardy

Clause should protect the finality of the result of that proceeding.

C. The Court Of Appeals Erred In Applying *Bullington* To A Proceeding That Is Not Functionally Equivalent To A Trial On Guilt Or Innocence

The proceeding to determine persistent-offender status under Missouri law is quite different from the proceeding at issue in *Bullington*. Because a persistent-offender sentencing hearing is not the functional equivalent of a trial on the issue of guilt or innocence, the court of appeals erred in holding that *Bullington* applies in the context of this case.

The Court in *Bullington* noted several factors that informed its decision that the Double Jeopardy Clause should protect the finality of the determination at the initial capital sentencing proceeding in that case. As the court of appeals stated (Pet. App. A13), the requirement that the government prove its case beyond a reasonable doubt was one of those factors. See *Bullington*, 451 U.S. at 438. But reading *Bullington* to require application of the Double Jeopardy Clause solely because the State has undertaken the burden of proving its case beyond a reasonable doubt ignores much of the analysis of the Court's opinion in *Bullington*.⁷ As we have explained above, the opinion in

⁷ The court of appeals noted other factors that it viewed as supporting its holding. See Pet. App. A13-A14 (stating that Missouri law requires a charging document to plead all facts supporting persistent-offender status, that the trial court must make findings of fact, and that the defendant has rights of confrontation, cross-examination, and the right to present evidence). None of those factors appeared to be critical to the Court's analysis in *Bullington*, and, in our view, those factors do not either individually or collectively

Bullington appears to rest not on any single factor, but on the juxtaposition of a variety of factors that, taken in combination, rendered the proceeding in *Bullington* a trial on the question of life or death, indistinguishable as a practical matter from the earlier trial on the question of guilt or innocence. Hence, the lower court erred in construing *Bullington* to require a freewheeling examination of every sentencing process adopted by each prosecuting jurisdiction in the country to determine whether the process bears any of the hallmarks of the principal trial. *Bullington* applies only when the process bears all of those hallmarks, and thus is functionally equivalent to the principal trial. Under current sentencing procedures in the state and federal systems, that occurs only in capital sentencing hearings.

An examination of the hearing at issue in this case reveals significant differences from the capital sentencing hearing at issue in *Bullington*. Most obviously, unlike the capital sentencing hearing in *Bullington*—which required a choice between life imprisonment and the death penalty—the hearing in this case did not involve the sort of decisive yes/no question that has a sufficiently fundamental effect on the

offer a substantial basis for distinguishing the proceeding in question here from traditional noncapital sentencing proceedings. We note that several of those rights are analogous to rights provided by the Federal Rules of Criminal Procedure. See Fed. R. Crim. P. 32(a)(1) (requiring advance notice of the basis for the defendant's sentence, as well as an opportunity for the defendant to respond and present responsive information), 32(c)(3)(A) (defendant has opportunity, in discretion of court, to introduce evidence regarding disputed information in presentence report), and 32(c)(3)(D) (court must make a written record of findings with respect to controverted facts).

outcome of the trial as a whole to justify a constitutional rule of finality. Like most factual findings that are relevant at sentencing, the question whether respondent was a persistent offender was only a subsidiary finding that slightly altered the boundaries of what otherwise remains a traditional and relatively open-ended sentencing process.⁸ Even after the determination is made, the sentencer will have the discretion to select a sentence from among a wide range of sentences (in this case, ranging from ten years to life imprisonment). To treat such a proceeding as the functional equivalent of a trial, and thus to equate the State's failure to prove its case at that proceeding with the State's failure to establish guilt at trial, would strip *Bullington* from its moorings and ignore the contrary historical tradition with respect to sentencing proceedings.

The same conclusion follows *a fortiori* for even more conventional sentencing proceedings such as those conducted by federal courts under the Sentencing Guidelines. In those proceedings, the sentencing court resolves any factual disputes under a preponderance-of-the-evidence standard. See, e.g., *United States v. Restrepo*, 946 F.2d 654, 655 (9th Cir. 1991) (en banc) (“Every circuit that has considered the question” has approved use of the preponderance standard at sentencing proceedings under the Sentencing Guidelines.) (citing cases from ten

⁸ Indeed, in the case of the statute at issue here, the finding that a defendant is a persistent offender has a particularly minimal effect, because that finding does not even alter the sentencing range; it simply frees the court to impose sentence without obtaining a recommendation from the jury. See note 3, *supra*.

of the courts of appeals), cert. denied, 112 S. Ct. 1564 (1992); see also *Kinder v. United States*, 112 S. Ct. 2290, 2291-2292 (1992) (White, J., dissenting from denial of certiorari) (all "Circuits recognize that the preponderance standard ordinarily pertains" at sentencing). Also, as in this case, the determination of any particular fact made relevant by the Sentencing Guidelines does not deprive the sentencer of relatively unguided discretion to select a sentence from within the Guidelines sentencing range. See 18 U.S.C. 3742(a) and (b) (1988 & Supp. III 1991) (no appeal from sentence within sentencing range established by Sentencing Guidelines). Moreover, the sentencer retains significant discretion to impose any sentence permitted by statute if it determines that the case involves a "circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. 3553(b).

Even though the Missouri persistent-offender proceeding is an unusual sentencing proceeding and has characteristics that distinguish it from the more conventional sentencing schemes, it is still sufficiently different from a trial on the issue of guilt or innocence that the Double Jeopardy analysis of *Bullington* does not apply. The court of appeals was therefore in error in applying *Bullington* to the sentencing proceeding in this case and directing that respondent be resentenced without invocation of the Missouri persistent-offender procedures.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

557.036. Role of court and jury in sentencing—jury informed of penalties.—1. Subject to the limitation provided in subsection 3 upon a finding of guilt upon verdict or plea, the court shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly.

2. The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as a part of their verdict, unless

(1) The defendant requests in writing, prior to voir dire, that the court assess the punishment in case of a finding of guilt, or

(2) The state pleads and proves the defendant is a prior offender, persistent offender, or dangerous offender, as defined in section 558.016, RSMo.

If the jury finds the defendant guilty but cannot agree on the punishment to be assessed, the court shall proceed as provided in subsection 1 of this section. If there be a trial by jury and the jury is to assess punishment and if after due deliberation by the jury the court finds the jury cannot agree on punishment, then the court may instruct the jury that if it cannot agree on punishment that it may return its verdict without assessing punishment and the court will assess punishment.

3. If the jury returns a verdict of guilty and declares a term of imprisonment as provided in subsection 2 of this section, the court shall proceed as pro-

vided in subsection 1 of this section except that any term of imprisonment imposed cannot exceed the term declared by the jury unless the term declared by the jury is less than the authorized lowest term for the offense, in which event the court cannot impose a term of imprisonment greater than the lowest term provided for the offense.

4. If the defendant is found to be a prior offender, persistent offender, or dangerous offender as defined in section 558.016, RSMo:

(1) If he has been found guilty of a class B, C, or D felony, the court shall proceed as provided in section 558.016, RSMo, or

(2) If he has been found guilty of a class A felony, the court may impose any sentence authorized for a class A felony.

5. The court shall not seek an advisory verdict from the jury in cases of prior offenders, persistent offenders, or dangerous offenders; if an advisory verdict is rendered, the court shall not deem it advisory, but shall consider it as mere surplusage.

558.011. Sentence of imprisonment, terms—conditional release.—1. The authorized terms of imprisonment, including both prison and conditional release terms, are:

(1) For a class A felony, a term of years not less than ten years and not to exceed thirty years, or life imprisonment;

(2) For a class B felony, a term of years not less than five years and not to exceed fifteen years;

(3) For a class C felony, a term of years of [sic] not to exceed seven years;

(4) For a class D felony, a term of years not to exceed five years;

(5) For a class A misdemeanor, a term not to exceed one year;

(6) For a class B misdemeanor, a term not to exceed six months;

(7) For a class C misdemeanor, a term not to exceed fifteen days.

* * * *

558.016. Extended terms for persistent or dangerous offenders—definitions.—1. The court may sentence a person who has pleaded guilty to or has been found guilty of a class B, C, or D felony to a term of imprisonment as authorized by section 558.011, if it finds the defendant is a prior offender, or to an extended term of imprisonment if it finds the defendant is a persistent offender or a dangerous offender.

2. A “**prior offender**” is one who has pleaded guilty to or has been found guilty of one felony.

3. A “**persistent offender**” is one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times.

4. A “**dangerous offender**” is one who:

(1) Is being sentenced for a felony during the commission of which he knowingly murdered or endangered or threatened the life of another person or knowingly inflicted or attempted or threatened to inflict serious physical injury on another person; and

(2) Has pleaded guilty to or has been found guilty of a class A or B felony or a dangerous felony.

5. The pleas or findings of guilty shall be prior to the date of commission of the present offense.

6. The total authorized maximum terms of imprisonment for a persistent offender or a dangerous offender are:

- (1) For a class A felony, any sentence authorized for a class A felony;
- (2) For a class B felony, a term of years not to exceed thirty years;
- (3) For a class C felony, a term of years not to exceed fifteen years;
- (4) For a class D felony, a term of years not to exceed ten years.

558.021. Extended term procedures.—1. The court shall find the defendant to be a prior offender, persistent offender, or dangerous offender, if

(1) The indictment or information, original or amended, or the information in lieu of an indictment pleads all essential facts warranting a finding that the defendant is a prior offender, persistent offender, or dangerous offender; and

(2) Evidence is introduced that establishes sufficient facts pleaded to warrant a finding beyond a reasonable doubt that the defendant is a prior offender, persistent offender, or dangerous offender; and

(3) The court makes findings of fact that warrant a finding beyond a reasonable doubt by the court that the defendant is a prior offender, persistent offender, or dangerous offender.

2. In a jury trial, the facts shall be pleaded, established and found prior to submission to the jury outside of their hearing, except the facts required by subdivision (1) of subsection 4 of section 558.016 may be established and found at a later time, but prior to sentencing, and may be established by judicial notice of prior testimony before the jury.

3. In a trial without a jury or upon a plea of guilty, the court may defer the proof and findings of such facts to a later time, but prior to sentencing.

The facts required to subdivision (1) of subsection 4 of section 558.016 may be established by judicial notice of prior testimony or the plea of guilty.

4. The defendant shall be accorded full rights of confrontation and cross-examination, with the opportunity to present evidence, at such hearings.

5. The defendant may waive proof of the facts alleged.

6. Nothing in this section shall prevent the use of presentence investigations or commitments under sections 557.026 and 557.031, RSMo.

7. At the sentencing hearing both the state and the defendant shall be permitted to present additional information bearing on the issue of sentence.